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**IDAHO PERSONNEL
COMMISSION**

OCT 10 2012

FILED

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

IDAHO STATE UNIVERSITY,)	
)	
Appellant,)	IPC NO. 11-10
)	
vs.)	DECISION AND ORDER ON
)	PETITION FOR REVIEW
LAURIE SCHORSCH,)	
)	
)	
Respondent.)	
_____)	

This matter is on petition for review from the March 15, 2012 decision of Hearing Officer Kelly Kumm (hereinafter "Hearing Officer"). At the conclusion of an approximately five-hour evidentiary hearing on February 2, 2012, the Hearing Officer determined that Idaho State University (hereinafter "ISU") failed to establish, by a preponderance of the evidence, that Laurie Schorsch (hereinafter "Schorsch") engaged in conduct subject to discipline pursuant to Idaho Code § 67-5309(n)(5) and IDAPA 15.04.01.190.01.e - insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department (hereinafter "IPC Rule 190.01.e" or "Rule 190.01.e"), reversed Schorsch's dismissal from classified service and ordered that she be reinstated and reimbursed. ISU timely petitioned for review.

**DECISION AND ORDER
ON PETITION FOR REVIEW- 1**

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Background and Prior Proceedings

Schorsch held the position of Customer Service Representative for the Veteran's Sanctuary at ISU starting August 23, 2011. On October 10, 2011, her supervisor, Jeffrey Casey Santee ("Santee") met with Schorsch and notified her of behavior problems, which became the subject of discipline, and on October 20, 2011 she was placed on administrative leave. T. at 225-227. On November 16, 2011, Schorsch received a Notice of Contemplated Action ("NOCA") from Dr. Patricia Terrell (hereinafter "Terrell"), Vice President for Student Affairs. The NOCA indicated that ISU was considering the termination of Schorsch's employment for violation of IPC Rule 190.01.e. The notice alleged that Schorsch had: (1) continued hugging veterans against her supervisor's directive; (2) made a comment about a student veteran's mood and academic performance while conducting a tour; (3) attempted to acquire an invitation to a party against her supervisor's directive; (4) criticized the Holt Arena Ticket Office's handling of free football game tickets to returning members of the National Guard; and (5) was insubordinate and/or unbecoming a state employee in calling the ISU Marketing and Communications Department regarding the issuance of a press release for the Sanctuary. After allowing a response from Schorsch, Terrell terminated Schorsch's employment effective December 6, 2011.

Schorsch timely appealed her dismissal to the Commission on December 14, 2011. After an approximately five-hour hearing on February 2, 2012, the Hearing Officer reversed Schorsch's dismissal from classified service and ordered that she be

reinstated and reimbursed. ISU timely filed a petition for review with the Commission on April 17, 2012.¹

B. Facts

Schorsch was a permanent classified employee of ISU. She had been employed by ISU for approximately twenty-two (22) years. Prior to her employment with the Veteran's Sanctuary at ISU (hereinafter "Sanctuary"), Schorsch was employed in the Graduate School as an administrative assistant. Because of budget cuts, she accepted a lateral transfer to the Sanctuary and began employment there on August 23, 2011.

Schorsch was hired and directly supervised by Santee, recruiter, counselor, and acting director for the Sanctuary. T. at 8. In the hiring interview with Schorsch, Santee recognized that Schorsch had an excellent employment history with ISU and voiced support for veterans as well as being a member of several veterans' service organizations. T. at 10.

1. Hugging Veterans.

The first basis upon which ISU contends disciplinary action is warranted is Schorsch's hugging of military veterans, who are clients of the Veteran's Sanctuary, after being instructed not to do so.

Shortly after her employment at the Veteran's Sanctuary began, it was reported that Schorsch would ask veterans (clients) if she could give them a hug and proceeded to give them a hug to show support and appreciation for their service. Ex. 1, p.1. After learning this Santee directed Schorsch to "not ask to hug or hug" the veterans in the future. He testified he believed he did this in the first week. T at 13. He explained it

¹ ISU is not appealing the Hearing Officer's conclusion with respect to the incidents described in Nos. 2 and 4, above, leaving just the other three incidents before the Commission. See Appellant's Brief in Support of Its Petition for Review, p. 2, footnote 1.

was inappropriate to touch clients in any office and especially here since many of the clients have PTSD (Post Traumatic Stress Disorder). T. at 51-52. Terrell testified that "hugging a student in any department of the university is entirely inappropriate." T. at 130.

Despite being directed not to ask to hug or hug clients, there is testimony that Schorsch continued to do so on at least one occasion. Santee testified that several weeks after giving Schorsch a directive not to hug, he saw her ask a veteran if she could give him a hug and believes that she in fact did, although the alleged act was obscured from his view.

A student veteran, Sean Kelsch (hereinafter "Kelsch"), testified that he witnessed Schorsch on multiple occasions and that she asked to hug him as well when they met. T. at 184-185. It is unclear from testimony whether Kelsch witnessed hugging after Schorsch was told to stop hugging, but Kelsch did testify that he remembers an occasion in September when Santee told Schorsch that she needed to stop hugging individuals and that they had talked about it before. T. at 186.

Kale Bergeson (hereinafter "Bergeson"), the outreach officer at the Sanctuary, testified that he saw Schorsch hug clients at least over a dozen times and that it was a fairly regular occurrence after she started working there. T. at 167. Bergeson also testified that after Santee had directed Schorsch to stop hugging, the hugging seemed to slow down but he could not remember if it stopped completely. T. at 168. He did not testify to any specific instances of hugging after Schorsch was directed to stop.

Schorsch testified that she "might have possibly hugged one other vet" and there is another veteran named Doc Birdsong who comes regularly and initiates hugs with the

female staff members. Mr. Birdsong testified, corroborating the fact that he initiated hugging Schorsch. T. at 253. Schorsch remembered telling Karina Hensley from Human Resources that after Santee told her to stop hugging veterans that she only did it once or twice after that. T. at 228. Later, Schorsch testified she could not remember if she had or had not hugged any clients (other than reciprocating Doc Birdsong's initiated hug) after Santee had told her to stop but admitted it was "a possibility that I hugged another one." T. at 230. When the hearing officer asked what her motivation likely was for continuing to hug if she had done so, Schorsch replied "out of habit, I guess. It was – it was a bad choice on my part." T. at 245.

2. Invitation to President's Reception.

The second basis for disciplinary action at issue before the Commission on petition for review is Schorsch's email to the President's Office requesting an invitation to a reception for student veterans and her dialogue with people concerning not being invited.

The evidence and testimony presented clearly establish that the President of ISU was hosting a reception for veterans and that Schorsch wanted to go but did not receive an invitation. T. at 29-30. According to Schorsch's testimony, she told Santee she was going to call the President's Office to seek an invitation and Santee replied that she did not think it would be a good idea. T. at 215. Thereafter, Schorsch sent an email to the secretary of the President's Office from her work email identifying herself by her title and in association with the Sanctuary. Ex. A. Schorsch wrote in this email that she "had a thought, maybe not such a good one" and that thought was that she should be invited to the reception even though "Casey might kill me for asking." *Id.* In her testimony,

Schorsch says she does not believe that Santee would literally kill her but, rather, the statement was made in reference to him saying calling the President's Office was not a good idea. T. at 216.

Schorsch testified that Santee did not tell her she could not attend the event and that he said she just could not go without an invitation. T. at 216. On cross examination, Schorsch testified that she defied Santee in seeking an invitation to the party and admitted it was not professional to say "Casey might kill me." T. at 234. Schorsch also admitted that she was aware at the time she sent the email that sending it would be against Santee's wishes. T. at 235. Schorsch testified that the people she complained to about not being invited to the reception were just "a couple of students that come into the office all of the time that I consider close friends or friends." T. at 218. Schorsch testified that she made a comment about crashing the party several times but she made it in a clearly joking manner. T. at 217.

Santee testified that he communicated to Schorsch that there were a limited amount of invitations and further invitations were not an option. T. at 29-30. Santee stopped short of ever saying he directed Schorsch not to seek an invitation. Santee also testified that Schorsch had complained to many people about not being invited to the reception while at the Sanctuary. T. at 30-31. Santee testified that Kelsch had reported to him that Schorsch had threatened to crash the party if she couldn't attend. T. at 34-35.

Kelsch testified that Schorsch complained numerous times to veterans at the Sanctuary about not being invited to the reception and that she threatened to crash the party if she was not invited. T. at 187-188.

Bergeson testified that "every day, almost everyone . . . who walked up to the counter there seemed to be told . . . that she wasn't invited and she thought she should be." T. at 174. Bergeson also testified that he heard Schorsch say she would crash the party "at least five or six times" and seemed to take this "very seriously." T. at 176.

Terrell testified that the party was a university-related event and Schorsch would have attended it as an employee. Terrell also testified that she interprets the email to the President's Office as insubordination. T. at 136.

3. Press Release Incident.

The last basis for discipline at issue before the Commission on petition for review is regarding Schorsch's interaction with the Marketing and Communications Department.

Approximately one week before soldiers were scheduled to return from Iraq on October 8, 2011, Santee authored a press release indicating that ISU was hosting a celebration for the returning soldiers. T. at 23-24; Ex. 1, p. 2. The press release was sent out on one day and scheduled for release by the University Relations Department on the following day. T. at 24-25. After realizing that the press release had not gone out as scheduled, Santee had a discussion with Schorsch in which he advised Schorsch he was going to walk down to the University Relations Department to find out why it had not gone out. *Id.*

Schorsch volunteered to contact University relations for Santee by phone and Santee asked her to please not do so as he was already heading over there himself. T. at 25-26. Upon arrival at the University Relations Department, Santee had a discussion with Emily Frandsen (hereinafter "Frandsen") who indicated she felt Santee should "talk"

to Schorsch about phone etiquette. *Id.* Frandsen testified that Schorsch called about ten minutes before Santee arrived and asked for Andy Taylor's (hereinafter "Taylor") cell phone number and threatened that if the press release was not sent out, Santee would go to Taylor's house and make him send it out. T. at 193-194. Santee testified that "it wouldn't have taken more than ten minutes" to walk from the Sanctuary to the University Relations Department. T. at 84.

Schorsch testified that she actually told Santee that she would try to get in touch with Taylor to resolve the delayed press release issue and Santee said ok. T. at 222. She testified that she called Andy's number three times and left a message and then obtained Frandsen's cell phone number from an unnamed individual. *Id.* It is unclear from Schorsch whether she did or did not talk to Frandsen but is adamant that all her calls were prior to Santee's leaving to walk over. T. at 224-225.

II.

ISSUE

Did ISU prove by a preponderance of the evidence that Appellant violated IPC Rule 190.01e.?

III.

STANDARD OF REVIEW

The standard of review on disciplinary appeals to the Commission is as follows:

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 29.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. §

67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

The law is clear that once proper cause is proven for discipline under I.C. § 67-5309(n) and IPC Rule 190, the Commission (and its hearing officers) have no authority to second guess the choice of discipline imposed. *Sickles v. Idaho Dep't of Labor*. IPC No. 04-15 (May 2005).

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, any transcript submitted, and briefs submitted by the parties. I.C. § 67-5317(1). The Commission conducts a de novo review of the record and may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Zweigart v. Idaho State University, IPC No. 08-13 (Decision and Order on Petition for Review, July 30, 2009); *Whittier v. Dep't of Health and Welfare*, 137 Idaho 75, 78 (2002).

IV.

DISCUSSION

The question before the Commission is whether ISU established proper cause for Appellant's termination by a preponderance of the evidence.

A. Hugging of Veterans

ISU has not met its burden of proving by a preponderance of the evidence that Schorsch was insubordinate by hugging veterans after being instructed not to do so.

Insubordination is a "willful or intentional disregard of the lawful and reasonable instructions of the employer". *Whitter v. Dep't of Health and Welfare*, IPC Case No. 98-03 (Decision and Order on Petition for Review, p. 5, September 24, 1999); *Whittier v. Dep't of Health and Welfare*, 137 Idaho 75, 79 (2002). It has also been very similarly defined as a deliberate or willful refusal by an employee to obey a reasonable order or directive which an employer is authorized to give and entitled to have obeyed. *Worman v. Idaho Dep't of Correction*, IPC Case No. 04-24 (Decision and Order on Petition for

Review, June 25, 2007) (citing *Whittier*, supra). Accordingly, a finding of insubordination requires proof that the employee intentionally or willfully disregarded a lawful and reasonable instruction from an employer or supervisor. *Whitter*, IPC Case No. 98-03 (Decision and Order on Petition for Review, pp. 5-6, supra.)²

While we find that the directive not to hug was reasonable and Santee had authorization to give it, ISU has not proven Schorsch intentionally or willfully disregarded the directive.

As set forth above, Santee testified that a few weeks after being told not to hug, he heard Schorsch ask if she could hug someone and believes she went ahead and did so, but he didn't see it. Bergeson testified he thinks Schorsch's hugging slowed after being told not to, but isn't sure if it stopped completely. He did not testify to any specific examples of hugging after the directive. Kelsh didn't testify to witnessing any hugs after the directive, and only vaguely testified to remembering an occasion in September when Santee told Schorsch that she needed to stop hugging individuals and that they had talked about it before. T. at 186.

Schorsch admitted to hugging Birdsong, but also testified she refrained from hugging the vets after being directed to, except she "might have possibly hugged one other vet". T. at 208-09. When Schorsch was asked by the hearing officer why she phrased it as "may have been one other", she explained that she believes there might have been one other hug beside Doc Birdsong because "someone testified that there

² The Hearing Officer and the parties in this matter reasonably cited *Zweigart v. Idaho State University*, IPC No. 08-13 (Decision and Order July 30, 2009) in defining insubordination as "act[ing] knowingly or with reckless disregard for the reasonable directives, rules or other mandates of her employer". *Whittier* is cited as well on this premise. Upon close review, the most accurate definition and established definition for insubordination is as set forth herein citing *Whittier* and *Worman*. *Zweigart's* rendition, while similar, is not what *Whittier* and this Commission has firmly established for defining insubordination and is hereby clarified.

might have been another one after I was told not to. I can't say yes or no, but I do know that I did hug Doc – reciprocated Doc's hugs after Casey told me not to". T. at 244. There is no evidence that Santee specifically told Schorsch not to hug Birdsong. Schorsch was referring to the general directive not to hug the veterans.

First of all, based on the record in this matter, ISU has failed to prove any further hugs beyond the Birdsong hug. The evidence shows Schorsch refrained from hugging veterans after the directive from Santee. The only evidence of further hugging is an instance of reciprocating Birdsong's hug and possibly one other hug, that nobody testified to visually witnessing and which Schorsch doesn't admit. Otherwise there isn't any evidence or testimony from anybody as to actually witnessing further hugs after the directive.

With respect to reciprocation of Birdsong's hug, it is clearly established that Birdsong initiated the hug. In fact, he testified he didn't give her, or the other ladies he hugged, any choice. T. at 253. She was going to get hugged. Under these circumstances, the fact that Schorsch reciprocated the hug does not amount to willful, deliberate refusal to obey Santee's directive. Presented with these facts, it can be reasonably inferred that refusal of the hug might have been awkward and difficult to do and Schorsch's return of the hug did not constitute a willful, deliberate refusal or disregard of Santee's order.

B. Invitation to the President's Reception

ISU has not met its burden of proving by a preponderance of the evidence that Schorsch violated Rule 190.01.e. by attempting to acquire an invitation to a party

against her supervisor's directive and repeatedly speaking of not having an invitation and of an intent to "crash" the party.

1. Insubordination. The Hearing Officer found that it is reasonable to conclude from the preponderance of the testimonial evidence that Santee told Schorsch that she could not seek an invitation to the reception and that she deliberately did so anyway. *Preliminary Order, p. 10.* The Hearing Officer found, however, that the directive wasn't a reasonable directive.

We find that the Hearing Officer erred in finding the directive wasn't a reasonable directive, if it was given. A directive not to seek an invitation under the circumstances is both a reasonable directive and within Santee's authority. Terrell testified that this was a university-related event and Schorsch, if she were to attend, would have attended it as an employee. T. at 161. Also, Schorsch used her work email and identified herself with her work title when contacting the President's Office. This evidence places the context firmly within the scope of "work" and thus under the authority of Santee. The directive is a reasonable directive.

However, we find that ISU has not proven that Santee directed Schorsch not to seek an invitation. Review of the evidence in this matter, including close review of the transcript, shows that Santee told her that she could not attend the reception; "that food had already been ordered, that there were only so many seats available, . . . further invitations were just off the table. It wasn't an option." T. at 29-30. Santee stopped short of testifying he directed Schorsch not to seek an invitation from the President's office. It is undisputed that when Schorsch told Santee she was going to ask for an invitation that he said it "wasn't a good idea". While Schorsch does admit, on cross

examination, she was aware Santee didn't want her to seek the invitation (T. at 234-35), she also testified Santee did not instruct her not to contact the president's office seeking an invitation. T. at 250.

From the evidence, it is certainly clear that Santee didn't want Schorsch to seek an invitation to the party. However, ISU has not proven by a preponderance of the evidence that Santee directed Schorsch not to seek the invitation. When an employee informs her employer/supervisor she is going to do something and that supervisor doesn't want it done and intends to direct it not be done, the supervisor should be more direct and clear on that instruction than simply saying "that's not a good idea". Schorsch testified she didn't think Santee had directed her not to seek an invitation, and, from the weight of the evidence, this is understandable. In order to prove insubordination under Rule 190.01.e., ISU must show Schorsch deliberately and willfully defied a reasonable directive, and even though the directive at issue is reasonable, ISU has not proven the directive was clearly given in order to show Schorsch deliberately defied it.

2. Conduct Unbecoming a State Employee and Detrimental to Good Order and Discipline of the Sanctuary.

The record clearly shows Schorsch frequently complained about not being invited to the reception and wanting badly to go. She also indicated an intent to "crash" the reception multiple times, although there was disputed testimony as to the tone in which she did so. Schorsch maintains she was clearly joking about crashing the party, while others in the office testified they took it seriously, including Santee. Schorsch did not crash the event.

"Conduct unbecoming a state employee or conduct detrimental to good order and discipline in the agency" under Rule 190.01.e. has always been a general category for proving proper cause for discipline. In some cases, violations of state agency policy and rule have amounted to conduct unbecoming and detrimental to good order and discipline. In other cases, certain behavior and conduct has been found to be unbecoming or detrimental to good order and discipline, while perhaps not violating specific policy of the agency. It is often a fact-intensive inquiry and depends on the particular circumstances presented.

In this case, the Hearing Officer found Schorsch's conduct did not rise to the level of conduct unbecoming a state employee or detrimental to the good order and discipline. *Preliminary Order* pp. 10-11. In the Preliminary Order, the Hearing Officer balanced what he recognized as "less than ideal" conduct, with Schorsch's motives of being supportive of veterans and found her conduct didn't rise to conduct unbecoming of a state employee or detrimental to good order and discipline under Rule 190.01.e.

We find no reason to overturn the Hearing Officer's determination. It is appropriate for the Hearing Officer to weigh Schorsch's testimony as to motive and mental state when she made statements regarding her lack of invitation and desire to attend the party, including her comments regarding "crashing" the party. It is fully within the Hearing Officer's purview to assess credibility and to weigh the evidence presented. We concur with the Hearing Officer's determination that ISU failed to prove by a preponderance of the evidence that Schorsch's conduct rose to the level of unbecoming a state employee or detrimental to the good order and discipline of the Sanctuary.

C. Press Release

ISU has not met its burden of proving by a preponderance of evidence that Schorsch violated Rule 190.01(e) by interacting with the University Relations Department. ISU failed to prove insubordination on Schorsch's part when she called University Relations because it didn't prove she did so AFTER being told not to do so. Schorsch adamantly denies calling after being told not to call. Frandsen testified she received the call from Schorsch and then spoke with Santee "about ten minutes later". T. at 194. Santee testified it took about "five minutes" to walk to the University Relations Department and would not have taken more than "ten minutes". T. at 26. ISU has not proven by a preponderance of the evidence that Schorsch made the call after being directed not to call.

Additionally, ISU has apparently justified discipline, on this issue of phone etiquette, based solely on Frandsen's interpretation and opinion of the phone call and all Frandsen testified to was that she thought she needed better phone etiquette, was agitated and a little bit threatening. T. at 194-95. Schorsch denies being rude or demanding (T. at 225), but even accepting Frandsen's interpretation and opinion of the phone call we concur with the Hearing Officer and find this does not rise to conduct unbecoming and detrimental to good order and discipline under these facts.

V.

CONCLUSION

ISU has not met its burden of proving by a preponderance of the evidence that Schorsch was insubordinate or behaved in a way that constituted conduct unbecoming a state employee or detrimental to good order and discipline, in violation of Rule

190.01.e. Therefore, pursuant to Idaho Code § 67-5316(4), IT IS HEREBY ORDERED, THAT Schorsch shall be reinstated in the same position or a position of like status and pay with ISU. Schorsch is also entitled to all pay and benefits for the period of discharge. Each party is responsible for its own attorney fees and costs.

VI.

STATEMENT OF APPEAL RIGHTS


Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:


- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision.

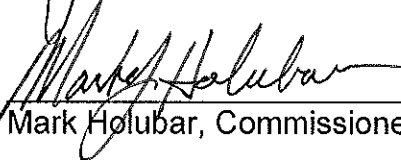
Idaho Code § 67-5318.

BY THE ORDER OF THE
IDAHO PERSONNEL COMMISSION


Mike Brassey, Commission Chairman


Pete Black, Commissioner


John Cowden, Commissioner


Mark Holubar, Commissioner

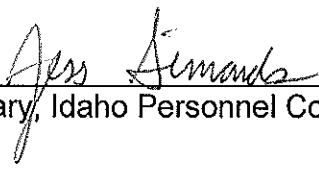
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by the method stated below on this 10 day of October, 2012.

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